Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

AMRIT LAL , Ph. D.
- Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA
STATE SYSTEM OF HIGHER EDUCATION,
JAMES McCORMICK, CHANCELLOR
JESSICA KOSLOFF, PRESIDENT,
BLOOMSBURG UNIVERSITY, and
JAMES PERCEY, PROFESSOR - RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Upon finding that the District Court's "Prima facie" conclusion may well be incorrect, was it an error to apply a standard in conflict with decisions of other circuits and in conflict with its own decisions to the question of whether the Plaintiff-Petitioner's case could survive a summary judgment motion by the Defendants-Respondents?

2. Did the grant of summary judgment to the Defendants-Respondents deprive the Plaintiff-Petitioner of due process of law, equal protection of the laws and the right to a jury trial as guaranteed by the United States Constitution, Amendments V, VII and XIV, in view of the fact that Plaintiff-Petitioner had met the burden required of him to defeat a summary judgment motion?

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Title VII, Civil Rights Act of 1964, 42 U.S.C. sec. 2000e, et seq.

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2 Eglit, Age Discrimination, sec. 7.29A (1997)

2 Eglit Age Discrimination, sec. 7.55 (1997)

1 Rossein, Employment Discrimination sec. 14.10[3] (1999)

2 Rossein, Employment Discrimination, sec. 22.10 (1999)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Amrit Lal, respectfully prays that a writ of certiorari issue to review the Orders of the United States Court of Appeals for the Third Circuit affirming a judgment of the United States District Court for the Middle District of Pennsylvania granting summary judgment to the Respondents in an age and race discrimination in employment case and denying Petitioner's Petition for a Rehearing.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit is not reported and appears as Appendix A to this Petition. The Order of the United States Court of Appeals for the Third Circuit denying the Petition for a Rehearing is not reported and appears as Appendix B to this Petition.

JURISDICTION

The Order of the United States Court of Appeals for the Third Circuit affirming summary judgment against the Petitioner was filed on June 23, 1999. A timely Petition for a Rehearing was filed on or about July 8, 1999. The Order of the United States Court of Appeals for the Third Circuit denying the Petition for a Rehearing was issued on August 30, 1999. This Court's jurisdiction is invoked under Title 28 U.S.C. sec. 1254(1). The time for filing a Petition for Certiori was extended to January 7, 2000.

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

Amendments V, VII and XIV to the United States Constitution are set forth in Appendix C. Also included in Appendix C are the following statutes:
29 U.S.C.A. sec. 623 (Age Discrimination in Employment Act)
42 U.S.C.A. sec. 2000e-2 (Title VII, Civil Rights Act of 1964)
(Relevant portions)

STATEMENT OF THE CASE

The Petitioner, Amrit Lal, Ph.D. (hereafter called "Lal") was born on June 1, 1931 in that part of India which now comprises the country of Pakistan. He is of the Hindu religion and of Asiatic Indian racial background. His family moved to the reconstituted India in 1948. He lived in India until 1958 when he moved to Afghanistan for three years with the United Nations Development Office in Kabul. He had worked with the United Nations previously from 1953 to 1958 in New Delhi, India. He moved to the United States in 1961 and was naturalized in 1976 [Appendix filed in the Court of Appeals, 390]. Hereafter, references to the Appendix filed in the Court of Appeals will be abbreviated to "App."

Lal was employed as a professor with the Pennsylvania State System of Higher Education ("SSHE") at Cheyney University in the Fall of 1970 and acquired tenure in 1975. In May of 1988 he was retrenched (laid off through no fault of his own) by the university administration due to its fiscal problems [App., 747]. He worked for a year as a faculty member of Kutztown University and then applied in 1990 for a position in the Political Science Department of Bloomsburg University having learned of an opening there. He was endowed with preferential hiring rights under the applicable Collective Bargaining Agreement ("CBA') between SSHE and the union of professors called the Association of Pennsylvania State College and University Faculties ("APSCUF") [App.,200]. When Bloomsburg declined to offer Lal employment Lal filed a grievance under the CBA through APSCUF. An arbitration was held and in a decision dated June 16, 1993 the arbitrator decided in favor of Lal requiring that Bloomsburg offer him a position in the Political Science Department equivalent to the one for which he had applied in 1990. The arbitrator found that Bloomsburg had not established that there was a reasonable basis to decline to hire Lal [App., 200-213]. In his discussion the arbitrator noted that under Article XXIX.1 of the CBA a retrenchee in Lal's position was required to serve a full year before being granted tenure and directed that Lal be considered for tenure in accordance with that article of the CBA and be entitled to a terminal year of employment if tenure were denied.

Lal commenced employment in the Political Science Department in August of 1993. Although Article XXIX.1 of the

CBA and the arbitrator's decision appear to require that Lal serve one full year at the new university before tenure may be granted, Lal consented in good faith to an early evaluation [App., 216]. In spite of the requirement that he work for a full year before evaluation for tenure, Lal's evaluation process was virtually complete by February 10, 1994, when the departmental evaluation was sent to the University-Wide Tenure Committee which rubber stamped the negative recommendation and sent it to the President of the University who denied tenure to the Petitioner, Lal, who has been out of gainful employment since May 1995.

During the period of Lal's employment in the Political Science Department of Bloomsburg, the department consisted of six members including Lal and the following:

> (a) Dr. Marla Brettschneider an assistant professor not a member of a minority group who was hired on August 21, 1993 to fill a vacancy caused by retirement of another faculty member, as a non-tenured first year probationary faculty member with the rank of assistant professor, and was younger than Lal, having recently received her Ph.D. from New York University in the Spring of 1993 [App., 348-9, 454];
>
> (b) Dr. Gloria Cohen, an assistant professor not a member of a minority group who was hired by Bloomsburg on August 21, 1993 as a non-tenured first year probationary faculty member with the rank of assistant professor to fill a vacancy left by the retirement of a faculty member, and was younger than Lal, having received a Ph.D. degree from Temple University in January, 1994 [App., 348, 454];

and three other more senior faculty members, viz.: Dr. George Agbango, assistant professor, James Percey, associate professor, and Richard Micheri, assistant professor.

Lal held the Ph.D. degree and had been a full professor at Cheyney with eighteen years of seniority. Thus, it appears that had he been granted tenure he would have been the ranking professor in the Department and making the highest salary. The possible ranks were full professor, associate professor, assistant professor and instructor. He had been hired at the rank of associate professor even though other members of the faculty with preferential hiring rights had been given the rank of full professor [App., 30]. Lal mentioned other instances of discrimination against Indians on deposition [App., 404]

Dr. Cohen eventually was reviewed for tenure in 1998 after the customary five year waiting period applicable to professors who had not been retrenched. It was admitted by Appellees that if Dr. Brettschneider had remained with Bloomsburg she would have been considered for tenure in the academic year 1997-98 [App., 69].

At the time of the review the faculty member submits a tenure application which includes his current resume, peer evaluations, student evaluations, the chairperson's visitation reports and evaluations, and any other material believed by the faculty member to be relevant to his suitability for tenure [App., 93-104]. The Dean of the College issued a memo directing that only Lal's activities since joining the faculty of Bloomsburg in August of 1993 were to be considered.

Although Drs. Cohen and Brettschneider (both younger than Lal and non-minority group members) had been hired at the same time he was [App., 69-70] they were not at that point applicants for tenure. Neither were in the class protected by Title VII. It is assumed that Dr. Brettschneider was in the class protected by the ADEA because of the date she received her Ph.D. degree. However, they were given annual reviews at the same time as Lal [App., 671]. The fact that they were compared with Lal in the recommendation of respondent Percey [App., 737] shows that they were in fact in competition with him contrary to the provisions of the CBA on preferential hiring rights which required a separate and distinct evaluation.

Lal's tenure committee of three members voted two to one against granting him tenure. Professor Saleem M. Kahn voted in favor of granting him tenure. It is significant that the positive vote was cast by a professor from another department who was not a party to the pattern of discrimination against Lal present in the Political Science Department [App., 215]. The evaluation of Professor Khan supports Lal's application for tenure. He states that Lal is a "good instructor" and that most of his student evaluations are "average or better" and that he had good peer evaluations [App., 234]. In accordance with the rules of the University, Dr. George Agbango as department head, prepared a separate performance evaluation of Lal. The evaluation was forwarded to the University-Wide Tenure Committee which rubber stamped the departmental evaluation and on March 23, 1994 forwarded its recommendation to the President of the

University, Dr. Curtis English, who had final responsibility for tenure decisions. Lal was not shown or permitted to comment on his evaluation contrary to Departmental practice in other cases and contrary to the CBA [App., 356-8]. The President accepted the University-Wide Tenure Committee recommendation and decided against granting Lal tenure without making an independent judgment of his own.

Lal's employment at Bloomsburg ended on May 26, 1995 when he was earning approximately $50,000 per year. Had he been granted tenure he would have been earning approximately $75,000 per year thereafter [App., 56, 356].

The District Court found that Lal had not made out a prima facie case of discrimination because he had not presented evidence that he was replaced by a younger or non-minority group person and thus had not made out the required prima facie case. However, on appeal, the Court of Appeals in its memorandum opinion stated that a prima facie case of discrimination probably had been made out by Lal. The memorandum opinion states (at p. 2):

> "Initially, we must observe that the District Court's 'prima facie' conclusion may well be incorrect because we do it necessarily agree that in this type of case courts may only find discrimination if the faculty member can show that he was replaced by a younger, non-minority, for the simple reason that, in cases like this one, only one professor may be up for tenure at the time."

However, the memorandum opinion goes on to state that the issue of whether or not there was a prima facie case did not have to be decided because the Respondents had offered substantial legitimate, non-discriminatory reasons for denying Lal tenure and Lal did not show that these reasons were lacking in credibility. The opinion concludes by indicating that Lal must show the pretextual nature of the Respondents' proffered reasons by demonstrating "such weaknesses, implausibilities, inconsistencies, incoherences, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them 'unworthy of credence.'" The opinion did not discuss whether or not Lal had shown whether or not it was likely that discrimination was at least one of the motivating factors behind the adverse employment decision.

REASONS FOR GRANTING THE WRIT

The following reasons are advanced for the granting of a writ of certiorari in this matter in accordance with the guidelines set forth in Rule 10 of the Rules of the Supreme Court of the United States.

A. The Decision of the United States Court of Appeals for the Third Circuit in the present matter is in conflict with decisions of United States Courts of Appeals in other circuits.

The District Court ruled that the Petitioner (hereafter known as "Lal") had not made out a prima facie case. The Court of Appeals correctly observed that the District Court's ruling "...may well be incorrect." As the Court of Appeals for the First Circuit pointed out in Brennan v. GTE Government Systems Corp., 150 F.3d 21 (1st Cir. 1998), the plaintiff's initial burden to establish a prima facie case of discrimination in employment is not onerous. Similarly, in Wallis v. J.R. Simplot Co., 26 F.3d 885 (9th Cir. 1994) the court held that the requisite degree of proof required to establish a prima facie case is minimal and need not even rise to the level of a preponderance of the evidence. The facts in the present case show a qualified minority-group professor over age 60 who was not given tenure, a decision tantamount to discharge in his case, while two younger professors who started teaching at the employer-university the same time he did were kept on the staff and continued on tenure track. The record shows that the defendants had pre-arranged a replacement thereby pre-empting any genuine evaluation of Lal. This fact, alone, is sufficient to establish a prima facie case, let alone the additional facts mentioned above.

However, the memorandum opinion in the case at bar goes on to state that the court did not need to decide whether there is a prima facie case because Lal could not demonstrate "...that the non-discriminatory reasons offered by Bloomsburg University for the denial of tenure were pretextual." The court held that Lal had not met the requirement of Fuentes v. Perskie, 32 F.3d 759 (3d Cir. 1994), that he demonstrate "such weaknesses, implausibilities, inconsistencies, incoherences, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them 'unworthy of credence'". The evidence upon which the District Court relied in its decision is self-serving and

does not meet the test of acceptable evidence in the absence of cross-examination to test credibility.

There is an abundance of bad faith exemplified by the defendants at each and every stage of the proceedings in connection with the reasons they have introduced in the face of the obvious pre-judgment of the issue of Lal's tenure.

1. Plaintiff's Burden at Trial

Although the case at bar did not proceed to trial, it is necessary to elucidate what would have been the plaintiff's burden at the trial of the case to place the summary judgment issue in context. In 2 Eglit, Age Discrimination, sec. 7.29A (1997), the author points out that since the decision of this Court in St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993) there has been a conflict among the circuits with respect to the burden upon the plaintiff in a discrimination case. Under the paradigm of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) once the plaintiff has proved a prima facie case a presumption arises that the employer has engaged in illegal discrimination. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). Then the defendant has the opportunity to introduce evidence that the reason for his adverse employment action against the plaintiff was not discriminatory, but legitimate. If the defendant is successful, the consequence is that the presumption of discrimination arising from the plaintiff's making out a prima facie case disappears and the plaintiff may have to make an additional showing. The extent of the additional showing which required of the plaintiff is the area of divergence among the circuits. Some circuits require that the plaintiff merely show that the employer's reason is pretextual while others require the plaintiff to show not only that the employer's reason is pretextual, but also that a discriminatory motive entered into the adverse employment decision. These two different approaches are called "pretext-only" and "pretext-plus", respectively.

In 1 Rossein, Employment Discrimination sec. 14.10[3] (1999), the author points out that the First, Fourth, Sixth and Eighth Circuits have adopted one version or another of a "pretext-plus" test requiring some direct or circumstantial evidence in addition to the plaintiff's evidence of pretext. The author goes on to say that the Second Circuit has adopted a middle ground holding that a plaintiff

may win if the evidence of pretext and/or other evidence points to discrimination.

For example, the following post-Hicks cases adopt the pretext-only approach: Anderson v. Baxter Healthcare Corp., 13 F.3d 1120 (7th Cir. 1994), Manzer v. Diamond Shamrock Chemicals Co., 29 F.3d 1078 (6th Cir. 1994), Waldron v. SL Industries, Inc., 56 F.3d 491 (3d Cir. 1999), Walker v. Nationsbank of Florida, N.A., 53 F.3d 1548 (11th Cir. 1995), Barbour v. Merrill, 48 F.3d 1270 (D.C.Cir. 1995). A number of circuits still adopt the modified pretext-only analysis. See Smith v. Borough of Wilkinsburg, 147 F.3d 272 (3d Cir. 1998) which held that a jury is permitted although not compelled to return a verdict for the employee who has made out a prima facie case if it finds the employer's reasons are pretextual. There are really two versions of the pretext-only approach. Under the extreme pretext-only approach, all the employee need do is show that the employer's reasons are false and he is automatically entitled to judgment. The modified version of the pretext-only analysis is that if the employee shows the proffered reasons are false then the trier of fact is permitted, though not compelled, to infer age discrimination. Under the pretext-plus formulation it is not only necessary to show the pretextual nature of the employer's reasons, the employee must also produce independent evidence that the employer's real reasons were discriminatory. Anderson v. Baxter Healthcare Corp., supra.

This Court's decision in St. Mary's Honor Center v. Hicks, supra, has been interpreted as rejecting both the extreme pretext-only position and the pretext-plus position and adopting the modified pretext-only position. Manzer v. Diamond Shamrock Chemicals Co., supra. In Manzer the Sixth Circuit held that a plaintiff must introduce some evidence of age discrimination other than his prima facie case where there is no evidence in his prima facie case which directly challenges the credibility of his employer's proffered explanation. The court said that the plaintiff could prevail after the defendant introduces a non-discriminatory reason by one of three avenues:

(1) showing that the proffered reason is factually false;

(2) showing that the proffered reason did not actually motivate the adverse employment action; or

(3) showing that the proffered reason is insufficient to motivate the adverse employment action.

Walker v. Nationsbank of Florida, supra was a modified

pretext-only case. The court held that disbelief of the employer's reasons for adverse employment action does not compel a judgment for the plaintiff. Although the factfinder's disbelief of the employer's proffered reasons and the plaintiff's prima facie case in combination may suffice to support a verdict of intentional discrimination, that result is not compelled. One of the concurrences points out that a factfinder may infer discrimination from the fact that the employer advanced a non-credible reason and that evaluation of credibility of witnesses is peculiarly the province of the jury.

On the other hand, the following post-Hicks cases adopt the pretext-plus approach: Rhodes v. Guiberson Oil Tools, 39 F.3d 537 (5th Cir. 1994), Nelson v. Boatmen's Bancshares, Inc., 26 F.3d 796 (8th Cir. 1994), wherein the court said that the plaintiff must do more than simply discredit the employer's explanation and must present evidence capable of proving that the real reason for the adverse action was discrimination based on age. Pretext-plus analysis also was adopted in Woods v. Friction Materials, Inc., 30 F.3d 255 (1st Cir. 1994) and Fisher v. Vassar College, 114 F.3d 1332 (2d Cir. 1997), cert. den. 522 U.S. 1075 (1998) wherein the court said that a finding of discrimination may be reversed even where there is a sustainable finding of pretext if the evidence on the whole will not support a finding of intentional discrimination.

The precise extent of the plaintiff's burden after the employer introduces legitimate, non-discriminatory reasons for action against the plaintiff is unclear and there is great variation among the decisions of the courts of appeal in the resolution of this issue.

2. Plaintiff's Requirements to Prevail in Summary Judgment Motion

In 2 Eglit Op.cit.supra, sec. 7.55 it is pointed out that numerous courts have expressed considerable reluctance to dispose of cases on motions for summary judgment in the field of discrimination in employment. Many discrimination cases turn on issues of intent which are peculiarly suitable for determination by a jury evaluating the credibility of live witnesses. The author cites the following examples: Hillebrand v. M-Tron Industries, Inc., 827 F.2d 363 (8th Cir. 1987), cert. den., 488 U.S. 1004 (1989), Stumph v. Thomas & Skinner, Inc., 770 F.2d 93 (7th Cir. 1985) wherein the court pointed out that summary judgment is improper in a discrimination case where there is a material issue involving the weighing of "conflicting

indications of motive and intent" (at. p. 97). The plaintiff should be required to "do more than offer proof which casts doubt upon the veracity of the employer's stated reason for its action" (at p. 97). Thornbrough v. Columbus & Greenville R. Co., 760 F.2d 633 (5th Cir. 1985), Haydon v. Rand Corp., 605 F.2d 453 (9th Cir. 1979). In Johnson v. Minnesota Historical Society, 931 F.2d 1239 (8th Cir. 1991) the court said that summary judgment should seldom be used in cases involving employment discrimination. In Waldron v. SL Industries,Inc., supra, it was pointed out that in St. Mary's Honor Society v. Hicks, supra, this Court did not address the standard to be employed in a summary judgment motion under the ADEA or Title VII.

In Woods v. Friction Materials, Inc. supra, a case decided by the First Circuit, the court indicated that to survive a summary judgment motion, the employee must show evidence sufficient for the trier of fact to conclude that the employer's adverse decision was based on an impermissible factor, thus ruling that the employee's burden exceeds the pretext-only standard.

The test in the Eighth Circuit is whether the evidence creates a fact issue as to whether the employer's proffered reasons are pretextual and creates a reasonable inference that age was a determinative factor in the employer's decision. Rothmeier v. Investment Advisers, Inc., 85 F.3d 1328 (8th Cir. 1996). In the Second Circuit it is held that the plaintiff's ultimate burden may be carried by reliance on the evidence used by the plaintiff to establish a prima facie case without more. Cronin v. Aetna Life Ins. Co., 46 F.3d 196 (2d Cir. 1995). Thus, the pretext-only, pretext-plus split appears to exist in the context of summary judgments as well as in the post-trial situation.

In 2 Rossein, Op.cit.supra, sec. 22.10 it was pointed out that some courts hold that showing that a proferred justification for adverse employment action is pretextual is the equivalent of a finding of intentional discrimination, citing, inter alia, Carden v. Westinghouse Elec. Corp., 850 F.2d 996 (3d Cir. 1988). However, the author points out that there is another line of cases which demands that the plaintiff show some positive proof that age motivated the employer's adverse action, citing inter alia, Bienkowski v. American Airlines, Inc., 851 F.2d 1503 (5th Cir. 1988).

In the case at bar the Court of Appeals for the Third Circuit

did not find the existence of any genuine issues of material fact for trial. In so doing, it overlooked the initial favorable reviews for Lal, the favorable review of the non-departmental member of his review committee, the favorable portions of his student evaluations, his serving as pre-law student advisor, and the fact that he was evaluated after only a few weeks rather than after the full year provided in the Collective Bargaining Agreement and the arbitrator's decision. Most importantly, the Court of Appeals overlooked the fact that the University had already turned him down for employment before any evaluation despite the fact that he had already attained tenure at a sister institution after years of faithful service. The University was forced to hire him pursuant to arbitration under the Collective Bargaining Agreement and had already lined up two other professors to fill the openings in his department when he commenced employment there. It was overlooked that in the normal course of events a tenure candidate has a minimum of ten full evaluations. In the case at bar, there was only one truncated evaluation taking into consideration none of the candidate's accomplishments prior to his becoming a member of the Bloomsburg faculty.

A party may raise issues of material fact by their own affidavits even if self-serving. Waldron v. SL Industries, supra citing Celotex Corp. v. Catrett, 477 U.S. 317 (1986). Lal gave an extensive deposition in which he related numerous facts from which age or race discrimination could be inferred. In Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) it was indicated that the standard to apply in a summary judgment motion is the same as that in a motion for a directed verdict, i.e. the court should view the evidence in a light most favorable to the non-moving party and give that party the benefit of all reasonable inferences. Manzer v. Diamond Shamrock Chemicals Co., supra. Only when a reasonable jury could not find for the non-movant should summary judgment be granted. Anderson v. Liberty Lobby, Inc., supra, wherein this Court said (at p. 255):

> "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions not those of a judge, whether he is ruling on a motion for summary judgment or a directed verdict."

The position being advocated here already has some support from this Court. In 2 Rossein, Op.cit.supra, sec. 22.10 it is noted that in Texas Dept. of Community Affairs v. Burdine, supra, the point is made that the plaintiff's initial evidence proving a prima facie case of discrimination combined with effective cross examination of the defendant can suffice to discredit the defendant's explanation. The Burdine opinion states (at 450 U.S. 255, fn. 10):

> "A satisfactory explanation by the defendant destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence. Nonetheless, this evidence and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual. Indeed, there may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation."

The holding of the Court of Appeals in the case at bar entirely removed the possibility that the defendants' evidence supporting their proferred reasons could be discredited through cross-examination of their witnesses.

Had this case arisen in the Second Circuit the decision might well have been different. In Danzer v. Norden Systems, Inc., 151 F.3d 50 (2d Cir. 1998), the court held that summary judgment may not be granted simply because the court believes that the plaintiff will be unable to meet the burden of persuasion at trial. There must either be a lack of evidence to support the plaintiff's position or the evidence must be so overwhelmingly tilted in one direction that any contrary finding would constitute clear error. The Court of Appeals for the Second Circuit pointed out that the plaintiff had successfully countered the defendant's proffered reasons for the adverse employment action by denying in his affidavit that his performance had declined and by alleging in his affidavit that he did not have adequate funding from his employer to meet the requirements of his job. The court found that the plaintiff's own affidavit created issues of fact and constituted an adequate production of evidence to rebut the

employer's explanation. The grant of summary judgment by the District Court was reversed and the matter remanded. Thus, in the Second Circuit Lal's case probably would have survived a summary judgment motion as his deposition testimony was sufficient to raise disputed issues of material fact under Danzer v. Norden Systems, Inc., supra.

The case at bar highlights the importance of allowing the trier of fact to make the determination of whether discrimination exits once there is enough evidence in the record to warrant a trial. In Courtney v. Biosound, Inc., 42 F.3d 414 (7th Cir. 1994), the Court of Appeals for the Seventh Circuit pointed out that evidence directly supporting a claim of intentional discrimination is rare and as a result the general rule that the non-moving party in a summary judgment matter should be granted the benefit of every inference favorable to his cause should be applied with added rigor in the context of employment discrimination. See also, Collier v. Budd Co., 66 F.3d 886 (7th Cir. 1995).

The opinion of the Court of Appeals for the Third Circuit in the case at bar does not demonstrate the "added rigor" required in the application of the summary judgment standard in the context of an action for discrimination in employment. Material issues of fact are disregarded in the rush to summary judgment.

In Anderson v. Baxter Healthcare Corp., supra, the Court of Appeals for the Seventh Circuit held that the plaintiff bore a lesser burden on a summary judgment motion than at trial. The plaintiff must only produce evidence from which a rational factfinder could find pretext. The Third Circuit appears to require that the plaintiff demonstrate as part of his defense to a summary judgment motion that the employer's proffered reasons are pretextual, not merely that a rational factfinder could draw the inference of pretext from the plaintiff's facts.

B. The Decision of the Court of Appeals so far Departed from the Accepted Course of Judicial Proceedings as to Call for an Exercise of this Court's Supervisory Power.

The right to a jury trial in Federal civil proceedings is guaranteed by the Seventh Amendment to the U.S. Constitution. It is a sacred right, embodied in the Magna Charta and originating at an even earlier time. The standard employed by the Court of Appeals in

the present case effectively deprived Lal of a jury trial. Even the opinion of the Court of Appeals, itself, concedes on the whole that Lal probably made out a prima facie case of discrimination. The employer's proffered reason for the adverse employment action might or might not have been given credence by the trier of fact, but the question of whether the proffered reason was the real reason for the adverse action should have been left to the jury. Anderson v. Baxter Healthcare Corp., supra decided by the Seventh Circuit adopts this position.

There is no question that the non-moving party in a summary judgment matter should be granted the benefit of every favorable inference that can be drawn from the record. Robertson v. Central Jersey Bank & Trust Co., 47 F.3d 1268 (3rd Cir. 1995). The Court of Appeals should have reviewed the record in the light most favorable to Lal given him the benefit of all reasonable inferences which could be derived from the evidence. Hankins v. Temple University, 829 F.2d 437 (3d Cir. 1987). This standard of review should have been applied with added rigor in this employment discrimination case. Stewart v. Rutgers, The State University, 120 F.3d 426, 431 (3d Cir. 1997).

This Court has ruled that doubts as to the existence of a material issue of fact are resolved against the moving party in a summary judgment motion. Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). In the case at bar there is a genuine issue of material fact that should be left to the jury. The issue is whether Bloomsburg's asserted reasons for not granting Lal tenure are truthful or whether his age or race were a determinative factor in the decision to deny him tenure. The Court of Appeals appears to have decided this question itself thus removing the question from the jury despite the unusual circumstances of the case. The effect of its decision was to deny Lal the right to jury trial.

Summary judgment in discrimination cases is generally disfavored. Runicho and Jacobs, Litigating Age Discrimination Cases, 1998 Cum.Supp., sec. 9:03, p. 126 wherein the authors said:

> A review of the case law presents two challenges for summary judgment motions. First, discriminatory motive and intent is, by nature, subjective, and issues of credibility of witnesses are typically required. Second, the granting of summary judgment motions cuts off the right to trial by jury.

In Hillebrand v. M-Tron Industries, Inc., supra, the court said (at p. 364), "Summary judgments should seldom be used in cases alleging employment discrimination." The court also observed (at p. 364), "Summary rulings are the direct antithesis of the full and fair process found in an adversary proceeding." Concededly, this Court has held that summary judgment applying the directed verdict standard (defendant entitled to judgment as a matter of law) does not violate the Seventh Amendment. Anderson v. Liberty Lobby, Inc., supra. However, in this case a directed verdict should not have been granted because there are too many possibilities for reasons for the adverse employment action other than the one advanced by the defendants. The plaintiff in the case at bar met the requirement of production of substantial evidence to survive a summary judgment motion. He showed that he had the appropriate qualifications and was doing an adequate job, his beginning evaluations were good, he was lured into consenting to an early evaluation, and there were discriminatory reasons behind his not obtaining tenure. Because the University's policies had created a situation where someone would have to go, it seems apparent that there never was any intention of providing Lal with a fair opportunity to obtain tenure. That the University already preferred the younger, non-minority group candidates when Lal had barely started is obvious from the record and from the fact that the University had been required to hire him in the first place. The determination of the credibility of the representatives of the University should have been left to the jury. Torre v. Casio, 42 F.3d 825 (3d Cir. 1994)

C. The Court of Appeals Has Decided an Important Question of Federal Law That Has not Been, but Should be, Settled by this Court.

The area of employment discrimination law is unsettled and clarification of some of the issues involved by this Court would be desirable. On November 8, 1999 this Court agreed to clarify some issues involved in proof required of employees to show they were victims of unlawful age discrimination. It granted a petition for a writ of certiorari in Reeves v. Sanderson Plumbing Products, Docket No. 99-536 (U.S. Supreme Court). The questions presented were (1) whether direct evidence of age discrimination was required to avoid judgment as a matter of law, (2) whether in motions for judgment as a

matter of law under Rule 50 the court should consider all evidence or just the non-movant's evidence, and (3) whether the standards for granting judgment as a matter of law under Rule 50 are the same as are employed in motions under Rule 56. This Court's action in Reeves highlights a perception that the area of discrimination in employment law needs clarification. The issues in the case at bar are not identical to those in Reeves, but nonetheless require clarification.

The disagreement among the Courts of Appeal as to exactly what is required on the part of an age discrimination plaintiff by way of proof and by way of a showing to prevail in a summary judgment motion by the defendant has been discussed above, and is equally applicable here.

The Court of Appeals for the Third Circuit has said in the past that if the plaintiff makes out a prima facie case the burden shifts to the employer to state a non-discriminatory reason for the adverse employment action against the plaintiff. If the employer successfully states a non-discriminatory reason, the employee at trial must discredit the employer's reason and must show that the adverse action was the result of discrimination against him. Torre v. Casio, Inc., supra, wherein the Court of Appeals for the Third Circuit pointed out that discrimination may be demonstrated by either direct or indirect evidence and that the McDonnell Douglas burden shifting analysis applies in age discrimination cases even where there is only indirect proof of discrimination. The Court pointed out that under McDonnell Douglas once the plaintiff makes out a prima facie case of discrimination the employer must show that there were non-discriminatory reasons for the firing of the plaintiff. If the employer successfully makes this showing the burden shifts to the employee to show both that the employer's proffered reason for termination was false and that discrimination was a determinative factor in the termination. It has been observed frequently that direct evidence of intentional discrimination is difficult to find. Therefore, a court must be willing to accept indirect evidence of discrimination in employment.

All the plaintiff need do to prevail in a summary judgment motion by the employer is either discredit the employer's proffered reasons by circumstantial or direct evidence or produce evidence to the effect that discrimination was "...more likely than not a motivating or determinative cause of the adverse employer action." Torre, at 830.

The plaintiff need not show that discrimination was the only reason for the adverse employment action, only that it was one out of perhaps a number of causes 42 U.S.C. sec 2000e-2(m) To the same effect is the Third Circuit decision, Fuentes v. Perskie, supra.

Thus, at the summary judgment stage the proof requirements of the Third Circuit are alternative, either will suffice to defeat the motion, although they both must be proved at trial. Moreover, even at trial the plaintiff need not prove that discrimination was the sole reason for the adverse employment decision, but only that it was a determinative factor. If the plaintiff can discredit the defendant's proffered reasons, he need not produce evidence in addition to his prima facie case to survive a summary judgment motion. The plaintiff can meet this requirement either by pointing to weaknesses, implausibilities and inconsistencies in defendant's proffered reasons or by showing that discrimination was more likely than not a reason for the adverse employment action. The plaintiff's evidence need not be the "smoking gun" type of direct evidence. Mesnick v. General Electric Co., 950 F.2d 816 (1st Cir. 1991). Clearly, indirect evidence of discrimination is sufficient. Torre v. Casio, supra.

At the summary judgment stage, the employee in the Third Circuit is only required to raise a genuine issue of material fact with respect to one of these two issues and all reasonable inferences must be drawn in his favor on this summary judgment motion. Bray v. Marriott Hotels, 110 F.3d 986 (3d Cir. 1997).

In the instant matter, the Court of Appeals seems to have completely ignored the second alternative method by which a plaintiff can survive the employer's summary judgment motion. In any event, the opinion does not even discuss whether Lal has shown that discrimination is likely to have entered into the adverse employment decision, but mentions only a perceived failure to discredit the employer's proffered reason for the action through pointing out inconsistencies and other defects in the employer's statements. Thus, the Court of Appeals appears not to have followed its own formulation of the standard for deciding summary judgment motions in this case. Considering the pre-judgment aspects of the matter, a reasonable factfinder could properly conclude that discrimination on account of age, race or both was the reason for the obvious favoring of the other new hirees from the very start.

A striking example of the conflict among the circuits in this

area of the law is shown by contrasting Hidalgo v. Overseas Condado Insurance Agencies, Inc., 120 F.3d 328 (1st Cir.l 1997) with Evans v. McClain of Georgia, Inc., 131 F.3d 957 (11th Cir. 1997). In Hidalgo, an age discrimination suit, the court assumed that the plaintiff had made out a prima facie case and held that the defendant had met its burden of production in bringing forth two non-discriminatory and presumptively legitimate reasons for discharging the plaintiff. The court pointed out that as a result the plaintiff had the burden of demonstrating that the proferred reason was not the true reason for the adverse employment decision and that age discrimination was the real reason. The court said that the plaintiff could not avoid summary judgment if there was no direct or circumstantial evidence of age discrimination in the record. It assumed (without deciding) that the Plaintiff's evidence established pretext on the part of the Defendant, but nonetheless affirmed the lower court's grant of summary judgment. The only evidence he had of age discrimination was a memo to him stating that he was expected to retire at the time he became eligible for retirement benefits at age sixty-five. The court did not consider this sufficiently probative to allow a reasonable jury to find discriminatory animus on the part of the Defendant. The court affirmed the lower court's grant of summary judgment because even though it could reasonably be found that the employer's proferred reason was pretextual, there was nothing upon which a finding of age discrimination reasonably could be based.

On the other hand in Evans v. McClain of Georgia, supra, the opposite result was reached. The District Court held that although there may have been a genuine dispute about the veracity of the Defendant's proferred reasons for discharging the Plaintiff, he could not prevail unless the evidence presented also indicated that intentional race discrimination was the true reason for his discharge. The Court of Appeals for the 11th Circuit held this to be error stating (at p. 964):

> "Under the established rule of law in this Circuit, a plaintiff can survive a motion for summary judgment or for judgment as a matter of law simply by presenting evidence sufficient to demonstrate a genuine issue of material fact as to the truth or falsity of employer's legitimate, nondiscriminatory reasons."

The grant of summary judgment was reversed. In the concurrence by Senior District Judge Limbaugh it is specifically acknowledged that the holding in Hidalgo v. Overseas Condado Ins. Agencies, Inc., supra, is in conflict with the Evans case because in Evans the plaintiff to survive summary judgment was required to produce evidence not only that the employer's proferred reason for adverse employment action was pretextual but also that the real reason for the adverse action was discriminatory.

The confusion engendered by this pattern of decision should be resolved by this Court. The Federal Court system should be provided with some clear guidelines on summary judgment in the context of employment discrimination. It should be made clear exactly what is required of a plaintiff to survive a defendant's summary judgment motion in an employment discrimination case to avoid the inequity of having the decision depend upon the circuit in which the case arose.

To conclude, whatever standard is adopted, the Plaintiff in the case at bar is entitled to a remand for trial before a jury in the District Court having presented ample evidence of prejudgment and discrimination which had the effect of depriving him of a $50,000 per year position with the potentiality of earning $75,000 per year in the future.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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(610) 832-5900

Attorney for Petitioner

Date: January 6, 2000.

APPENTIX A

THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-7525

AMRIT LAL, Ph.D,

Appellant

V.

STATE SYSTEM OF HIGHER EDUCATION (SSHE); JAMES H. MCCORMICK,Chancellor of the Commonwealth of Pennsylvania State System of Higher Education; J.KOZLOFF, Bloomsburg University President; JAMES PERCEY; Department of Political Science; BLOOMSBURG UNIVERSITY; JESSICA S, President of Bloomsburg University

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 97-cv-00982)

SUR PETITION FOR REHEARING

BEFORE: BECKER, Chief Judge,
SLOVITER, MANSMANN, GREENBERG, SCIRICA,
NYGAARD, ALITO,
ROTH, MCKEE and RENDELL, Circuit Judges

The petition for rehearing filed by the Appellant in the above-entitled case, having been submitted to the judges who participatcd in the decision of the this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court in banc, the petition for hearing is hereby DENIED.

By the Court,

_____

United States Circuit Judge

Dated : August 30th, 1999

(Unreported opinion - Not precedential)
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-7525

AMRIT LAL, Ph.D

Appellant

V.

STATE SYSTEM OF HIGHER EDUCATION, (SSHE); JAMES H. MCCORMICK, Chancellor of the Commonwealth of Pennsylvania State System of Higher Education: J. KOZLOFF, Bloomsburg University President; JAMES PERCEY, Department of Political Science; BLOOMSBURG UNIVERSITY: JESSICA S, President of Bloomsburg University

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR TIIE MIDDLE DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 97-cv-00982)
District Judge: Honorable Malcolm Muir
Submitted Under Third Circuit LAR 34.1(a)

June 17, 1999

BEFORE: NYGAARD, STAPLETON and COWEN, Circuit Judges.

(Filed June 23, 1999)

MEMORANDUM OPINION OF THE COURT

NYGAARD, Circuit Judge.

This is an appeal from the District Court's dismissal of Amrit Lal's Title VII, ADEA, and PURA claims. Lal, a sixty-two year old male college professor from India who was denied tenure, brought this case alleging discrimination based on age and national origin. The District Court, applying the shifting burden analysis used in discrimination cases, granted summary judgment to the defendants on the grounds that Lal could not establish his prima facie case and that he could not counter the legitimate, non-discriminatory reasons for the denial. We will affirm.

I.

Initially, we must observe that the District Court's "prima facie" conclusion may well be incorrect because we do not necessarily agree that in this type of case courts may only find discrimination if the faculty member can show that he was replaced by a younger, non-minority, for the simple reason that, in cases like this one, only one professor may be up for tenure at the time. We need not decide this issue, however,because we agree with the District Court that Lal could not demonstrate that the non-discriminatory reasons offered by Bloomsburg University for the denial of tenure were pretextual.

To wit, even if Lal had presented a prima facie case of

discrimination, the appellees have offered substantial legitimate, non-discriminatory reasons for the decision to deny tenure to Lal. They contend that Lal's application for tenure reflected weaknesses in the areas of effective teaching, scholarly growth and University-community service. The record reflects that other faculty members received higher student evaluations than Lal. The University Tenure Committee noted that Lal had failed to distribute syllabi in a timely maimer and that his submissions in the area of scholarly growth were insufficient. In reviewing Lal's application for tenure, Curtis English, the President of Bloomsburg University, noted that Lal had not published and presented any scholarly papers since the late 1960's.

Because the University has offered legitimate reasons for the denial of Lal's application for tenure, we need to consider whether Lal has shown that the University's proffered reasons for the denial are not worthy of belief. To discredit the University's proffered reasons, Lal "cannot simply show that the [University's] decision was wrong or mistaken." Fuentes v. Perskie, 32 F.3d 759, 765 (3d Cir. 1994). Instead, Lal must show "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them 'unworthy of credence.' " Id. (citation omitted).

Here, Lal claims that the Political Science Department Tenure Committee's review of his tenure application and the Department Chairman's recommendation that he not be given tenure are incredible. James Percey, Richard Micheri and Saleem Kahn were on the Political Science Tenure Committee that recommended by a majority vote that Lal not be given tenure. George Agbango, the Chairman of the Department of Political Science, also recommended that Lal not be given tenure. Lal asserted that the conclusions Percey, Micheri and Agbango reached in connection with his application for

tenure were unsubstantiated and not based on fair reasoning. He asserted that Percey and Agbango's deposition testimony stating that Lal's performance in the classroom was poor differs from their classroom observations of him in which they did not criticize his teaching methods. Lal also contended that the student evaluations were not accurately reviewed by Percey because he focused on selected certain questions in the evaluations. Lal contended that his own analysis of the student evaluations was more favorable than Percey's analysis. Lal further argued that contrary to Percey's statement that no information on scholarly growth was presented to the Political Science Tenure Committee, he did submit project and grant proposals. Lal also claimed that in the area of service to the University, he was an advisor to the Pre-Law Society and served on departmental committees. Lal argues that the above proves that the credibility and intent of Percey, Micheri and Agbango are questionable.

Lal only attempts to show that the conclusions of Percey. Micheri and Agbango was mistaken in certain respects. Demonstrating that the University's decision was wrong or mistaken does not show that the University's proffered reasons for denying Lal's application for tenure were not credible. See. Fuentes, supra. In addition, Lal has failed to show that the final decision by the University to deny his application for tenure was implausible or inconsistent. The Department of Political Science Tenure Committee's review of Lal's application for tenure and Agbango's recommendation and annual review of Lal were only part of the overall review of Lal's application for tenure. The President of the University, Curtis English, had the final decision as to all tenure applications, and he was not bound by the prior recommendations of Agbango or the Political Science Tenure Committee. Lal does not allege that the decision of English to deny his application for tenure was motivated by discrimination. Although English took into account the Political Science

Department Committee's recommendation as well as Agbango's annual review and recommendation, he also independently reviewed other materials in deciding whether Lal should be granted tenure. English reviewed the student evaluations arid noted the substantial concerns of students with Lal's teaching. English also discovered that Lal's student evaluations were lower than two other first-year faculty in his department and other faculty generally at the University. Finally, English reviewed the University Tenure Committee's findings that Lal's student evaluations were marginal and that his ability to communicate clearly was questionable. Lal has not shown that English's review of his application for tenure and his conclusion that it should be denied were implausible or inconsistent. We agree with the District Court's conclusion that Lal's assertions about the inaccuracies of Percey, Micheri and Aghango's review of his application for tenure would not enable a reasonable factfinder rationally to find that the University's proffered reasons for denying tenure were pretextual and unworthy of credence.

III.

In summary, we find no issues of material fact which would preclude the District Court from granting summary judgment. Moreover, the District Court's legal analysis sufficiently supports its conclusion that Lal has not shown he can clear the Fuentes hurdle by demonstrating "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them 'unworthy of credence.' Id therefore, we will affirm the grant of summary judgment.

TO TIIE CLERK:

Please file the foregoing opinion.

/S/ Richard L. Nygaard
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-7525

AMRIT LAL, Ph.D

Appellant

V.

STATE SYSTEM OF HIGIfER EDUCATION, (SSHE): JAMES H. MCCORMICK, Chancellor of the Commonwealth of Pennsylvania State System of Higher Education; J. KOZLOFF, Bloomsburg University President; JAMES PERCEY, Department of Political Science: BLOOMSBURG UNIVERSITY.

ON APPEAL FROM THiE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 97-cv-00982)
District Judge: Honorable Malcolm Muir

Submitted Under Third Circuit LAR 34.1(a)

June 17, 1999

BEFORE: NYGAARD, STAPLETON and COWEN,
Circuit Judges.

(Filed June 23, 1999)

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Middle District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1(a) on June 17, 1999.

On consideration whereof it is now ordered and adjudged by this court that the judgment of the district court entered on August 12, 1998, is hereby AFFIRMED.

Costs taxed against appellant.

ATTEST:

P. Douglas Sisk
Clerk

Date: June 23, 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

#D-59
April 15, 1999

No. 98-7525

Amrit Lal,

Appellant

v

Commonwealth of PA State System, et al.
(Middle District of PA Civil No. 97-982)

Present : Greenberg, McKee & Aldisert, Circuit Judges

1. Motion by Appellee, James Percey, to quash or dismiss appeal as to James Percey;
2. Response by Appellant, Amril Lal, to motion to quash or dismiss appeal.

Lynn M. Caswell
Case Manager (215) 597-3134

ORDER

The foregoing motion to dismiss the appeal as to James Percey is granted.

By the Court,

Mc.Kee
Circuit Judge

Dated : May 18th, 1999

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Amrit Lal Ph.D.,
Plaintiff
vs.

COMMONWEALTH OF PENNSYLVANIA :		No. 4:CV-97-0982
STATE SYSTEM OF HIGHER,	:	(Companit Filed 9/3/96)
EDUCATION, ET AL.,	:	(Judge Muir)

Defendants

ORDER
July 14, 1998

THE BACKGROUND OF' THIS ORDER IS AS FOLLOWS:

This age and national origin discrimination case was originally filed on September 3, 1996, in the United States District Court for the Eastern District of Pennsylvania. The case was transferred to this district on May 16, 1997, and received and filed in this district on June 27, 1997. On September 10, 1997, Plaintiff Amrit Lal filed an amended complaint. The defendants named in the amended complaint are Commonwealth of Pennsylvania State System of Higher Education; Bloomsburg University of Pennsylvania of the State System of Higher Education ("University") ; James McCormick, Chancellor of the State System of Higher Education; Jessica Kozloff, President of Bloomsburg University, and James Percey, Professor.

On March 31, 1998, Defendants Commonwealth of Pennsylvania, State System of Higher Education, Bloomsburg University, Jessica Kozloff and James McCormick filed a motion for summary judgment. That motion is fully briefed and ripe for disposition.

Also on March 31, 1998, Defendant Percey filed a motion for summary judgment. Lal did not file a brief in opposition to Percey's motion for summary judgment. In Lal's brief in

opposition to the motion for summary judgment filed by the other defendants, Lal agreed voluntarily to withdraw all claims against Percey, McCormick and Kozlofff. Lal also stated that the only claims that remain before the court are those asserted against the State System of Higher Education and Bloomsburg University for age and national origin discrimination. By order of June 26, 1998, we granted Percey's motion for summary judgment and dismissed the claims against Percey, McCormick and Kozlofff. This order deals with the motion for summary judgment filed by the State System of Higher Education and Bloomsburg University.

The court will consider this motion under the standards to be considered in determining whether or not to grant summary judgment. Summary judgment is appropriate only when there is no genuine issue off material fact which is unresolved and the moving parties are entitled to a judgment as a matter off law. Fed. R. Civ. P. 56 (c) Summary judgment should not be granted when there is a disagreement about the facts or the proper inferences which a fact finder could draw from them. Peterson vs. Lehigh Valley Dist. Council, 676 F.2d 81, 94 (3d Cir. 1992) "When a motion for summary judgment is made and supported as provided in (Rule 56), an adverse party may not rest upon mere allegations or denials of the adverse party's pleading... ." Fed. R. Civ. P. 56(e) The adverse party must show by affidavits, pleadings, depositions, answers to interrogatories, and admissions on file that there is a genuine issue for trial. Id. Because summary judgment is a severe remedy, the Court should resolve any doubt about the existence of genuine issues of fact against the moving parties. Mess vs. Marshall, 660 F.2d 517, 519 (3d Cir. 1981)

The United States Supreme Court has stated that in motions for summary judgment a material fact is one which might affect the outcome of the suit under relevant substantive law. Anderson vs. Liberty Lobby, Inc., 477 U.S. 242 (1986).

The Supreme Court also stated in Anderson that a dispute

about a material fact is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. at 248. "where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Matsushita Electric Indus. Co., Ltd. vs. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

Initially, the moving parties have the burden of demonstrating the absence of a genuine issue of material fact. Celotex Corp. vs. Catrett, 477 U.S. 317, 323 (1986) . This may be met by the moving parties pointing out to the court that there is an absence of evidence to support an essential element as to which the non-moving parties will bear the burden of proof at trial. Id. at 325. The non-moving parties then must make a sufficient showing as to the essential elements of their case that a reasonable jury could rind in their favor. Id. at 322-23.

In light of these principles, the court will address the motion for summary judgment filed by the Defendants. From the pleadings and evidentiary materials submitted by the parties, the court can discern some undisputed facts. Lal, a male from India, was employed by Bloomsburg University as an Associate Professor in the Department of Political Science. On May 25, 1994, Lal's application for tenure was denied by then President of Bloomsburg University, Curtis English. Lal was sixty-two years of age at the time he was denied tenure. Lal was the only faculty member in the Department of Political Science who applied for tenure.

Each non-tenured faculty member is observed twice each semester by two peers from his or her department. An observation report is completed by each observer which becomes part of the documentation for the faculty member's tenure application. In addition to faculty observations, students each semester complete a University approved evaluation of each of their instructors.

Each tenure track faculty member at Bloomsburg must be reviewed annually by his department tenure committee. The committee considers whether the faculty member has displayed effective teaching, fulffilled professional responsibilities, continued scholarly growth and contributed to the University or commmunity. The Political Science Tenure Committee reviewed Lal's student evaluations for the courses he taught at Bloomsburg and noted that the student evaluations of Lal were not as favorable to him as they should be. According to that Committee, Lal was not recommended for tenure because of his inability to demonstrate qualities of an effective teacher.

The annual evaluation of the department chair is also a component of a faculty member's tenure application. Dr. George Agbango, Chairman of the Political Science Department, prepared a performance evaluation of Lal dated December 15, 1993. Agbango stated in the evaluation that "Lal has potential for effective service to the department and the university."

Lal's application for tenure was also reviewed by the University Tenure Committee. The University Tenure Committee evaluated Lal's teaching effectiveness and performance of professional responsibilities, scholarly growth and University-community service. The University Tenure Committee determined that Lal's student evaluations were marginal. The University Tenure Committee relied on the Political Science Department Tenure Committee's report that Lal's student evaluations were below norm for the department. The University Tenure Committee found Lal's failure to distribute timely syllabi inexcusable given his many years of teaching experience. In addition, the University Tenure Committee determined that Lal's submissions in the area off scholarly growth or University-community service were insufficient for an experienced faculty member. The University Tenure Committee's final determination was that Lal's teaching effectiveness was inadequate and it recommended that Lal not be granted tenure. The recommendation

of the University Tenure Committee was forwarded to the President of Bloomsburg University, Curtis English, on March 22, 1994. English did not participate in the deliberations of either the Political Science Tenure Committee or the University Tenure Committee.

One of the responsibilities of the University President is to review the applications of faculty members for tenure. The President reviews several reports evaluating the faculty member, the University Tenure Committee's report, the department chairman's evaluation, the department tenure committee's report as well as other available data, i.e. student evaluations, peer evaluations, curriculum vita and materials relating to scholarly growth and community service. The President then makes a decision regarding each faculty member's teaching status. The President is not bound by any prior recommendation of the University Tenure Committee, the department chair or the department tenure committee when reviewing a faculty member's application for tenure. After a thorough review of Lal's record, English decided not to grant tenure to Lal. English's decision to deny tenure to Lal was based on the conclusion that Lal had not demonstrated that he was committed to quality teaching or motivating students to learn.

In support of their motion for summary judgment, the Defendants first contend that Lal's claims pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., the Age Discrimination in Employment Act, 29 U.S.C. § 621, et seq., and the Pennsylvania Human Relations Act, 42 P.S. § 951, et seq., should be dismissed. The Age Discrimination in Employment Act prohibits age discrimination in employment matters against individuals over the age of 40. 29 U.S.C. § 623(a) (1). The guidelines developed under Title VII of the Civil Rights Act of 1964 should be used when examining cases under the Age Discrimination in Employment Act and the Pennsylvania Human Relations Act. Maxfield vs. Sinclair, Int'l., 766 F. 2d 788 (3d Cir. 1935), cert. denied, 474 U.S. 1057 (1986); Borough of Economy vs. Pennsylvania Human Relations

committee., 660 A.2d 143, 147 (Pa. Cmwlth. 1995), appeal denied, 670 A.2d 143 (Pa. 1995) Under Title VII of the Civil Rights Act of 1964, the plaintiff has the initial burden of establishing a prima facies case of unlawful discrimination. McDonnell Douglass Corp. vs. Green, 411 U.S. 792, 802 (1973) . Once the plaintiff establishes a prima facies case, "the burden shifts to the defendants to articulate one or more legitimate, nondiscriminatory reasons for its employment decision." Waldron vs. SL Indus., Inc., 56 F.3d 491, 494 (3d Cir. 1993) . If the employer does produce evidence showing a legitimate, non-discriminatory reason for the termination, the burden of production shifts back to the employer who must show that the employer's proffered explanation is incredible. Texas Department of Community Affairs vs. Burdine, 450 U.S. 248, 245-55 (1981) To establish a prima facies case for denial of tenure based upon age or race, a plaintiff must establish that he: (1) is a member of a protected class; (2) was qualified for an employment position; (3) was dismissed despite being qualified; and (4) ultimately was replaced by a younger person sufficiently younger to permit an inference of age discrimination or was replaced by a person of another race. Torre vs. Casino, Inc., 42 F.3d 825, 330-31 (3d Cir. 1994).

The Defendants argue that Lal has failed to demonstrate the fourth element of the prima face case which is that he was ultimately replaced by a younger person sufficiently younger to permit an inference of age discrimination or that he was replaced by a person of another race. Lal was the only faculty member from the Department of Political Science to apply for tenure. Lal claims that he was treated differently than two white female professors in the Political Science Department. The two female professors, however, were considered for contract renewal and not tenure. The fourth element of the prima facies case "must be relaxed in certain circumstances, as when there is a reduction in force."42 F.3d at 831. There is no need to relax the fourth element of the prima facies case here because this is not a case where the plaintiff was competing for the same Position with other

employees who were ultimately retained. Although Lal may have been compared to the two female professors when the University was reviewing his tenure application, Lal has not demonstrated that the two female professors assumed his responsibilities upon the denial of his application for tenure. As a result, Lal has failed to show that he was replaced by younger persons or persons of a different race. Lal has not presented a prima facies case of discrimination.

Further, even if Lal had presented a prima facie case of discrimination, the Defendants have offered legitimate, non-discriminatory reasons for Lal's termination. The Defendants contend that Lal's application for tenure reflected weaknesses in the areas of effective teaching, scholarly growth and University-community service. The record reflects that other faculty members received higher student evaluations than those of Lal. The University Tenure Committee noted that Lal had failed timely to distribute syllabi and that his submissions in the area of scholarly growth were insufficient. In reviewing Lal's application for tenure, English noted that Lal had not published and presented any scholarly papers since the late 196O's.

Because the University has offered legitimate reasons for the denial of Lal's application for tenure, we next turn to the issue of whether Lal has shown that the University's proffered reasons for the denial are not credible. To discredit the University's proffered reasons, "the plaintiff cannot simply show that the employer's decision was wrong or mistaken." Fuentes vs. Perskie, 32 F.3d 759, 765 (3d Cir. 1994) . Lal must show "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them 'unworthy of credence.'" Id.

Here, Lal claims that the Political Science Department Tenure Committee's review of his tenure application and the

Chairman' s recommendation that he not be given tenure are incredible. James Percey, Richard Micheri and Saleem Kahn were on the Political Science Tenure Committee which recommended by a majority vote that Lal not be given tenure. George Agbango, Chairman of the Department of Political Science, in a report dated February 15, 1993, recommended that Lal not be given tenure. Lal asserts that the conclusions Percey, Micheri and Agbango reached in connection with his application for tenure were unsubstantiated and not based on fair reasoning. Lal asserts that Percey and Agbango's deposition testimony stating that Lal's performance in the classroom was poor differs from their classroom observations of him where they did not criticize his teaching methods. Lal also claims that the student evaluations were not accurately reviewed by Percey because he focused on selected certain questions in the evaluations. Lal contends that his own analysis of the student evaluations was more favorable than Percey's analysis. Lal further asserts that contrary to Percey's statement that no information on scholarly growth was presented to the Political Science Tenure Committee, he did submit project and grant proposals. Lal also claims that in the area of service to the University Lal was an advisor to the Pre-Law Society and served on departmental committees. Lal asserts that the above facts prove that the credibility and intent of Percey, Micheri and Agbango are questiofiable.

Lal only attempts to show that the review by Percey, Micheri and Agbango was mistaken in certain respects. Demonstrating that an employer's decision is wrong or mistaken is not sufficient to show that the University's proffered reasons for denying Lal's application for tenure were not credible. See Fuentes, supra. Lal has failed to show that the final decision by the University to deny his application for tenure was implausible or inconsistent. The Department of Political Science Tenure Committee's review of Lal's application for tenure and Agbango's recommendation and annual review of Lal were only part of the overall review of Lal's application. The President of the University, Curtis English, had the final

decision as to any tenure applications and was not bound by the prior recommendations of Agbango or the Political Science Tenure Committee. Lal does not allege that the decision of English to deny his application for tenure was motivated by discrimination. Although English reviewed the Political Science Department Committee's recommendation as well as Agbango's annual review and recommendation, he also reviewed other materials in deciding whether Lal should be granted tenure. English reviewed the student evaluations and noted concerns by students with Lal's teaching. English also discovered that Lal's student evaluations were lower than other first year faculty in his department and other faculty generally at the University. English reviewed the University Tenure Committee's findings that Lal's student evaluations were marginal and that his ability to communicate clearly was questionable. Lal has not shown that English's review of his application for tenure and his conclusion that it should be denied were implausible or inconsistent. Lal's assertions about the inaccuracies of Percey, Micheri and Agbango's review of his application for tenure would not enable a reasonable factfinder rationally to find that the University's proffered reasons for denying tenure were unworthy of credence. Consequently, there is no genuine issue of material fact and the State System of Higher Education and Bloomsburg University are entitled to judgment as a matter of law.

NOW, THEREFORE, IT IS ORDERED THAT:

1. The summary judgment motion (Document 14) filed by the State System of Higher Education and Bloomsburg University is granted.

2. The Clerk of Court shall enter judgment in favor of the Defendants and against the Plaintiff.

3. The Clerk of Court shall close this case.

MUIR, U.S. District Judge

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Amrit Lal Ph.D.,
Plaintiff
vs.

COMMONWELTH OF PENNSYLVANIA : STATE SYSTEM OF HIGHER, EDUCATION, ET AL.,	:	No. 4:CV-97-0982 (Companit Filed 9/3/96) (Judge Muir)

Defendants

ORDER
August 12, 1998

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

This age and national origin discrimination case was originally filed on September 3, 1996, in the United States District Court for the Eastern District of Pennsylvania. The case was transferred to this district on May 16, 1997, and received and filed in this district on June 27, 1997. On September 10, 1997, Plaintiff Amrit Lal filed an amended complaint. The defendants named in the amended complaint are Commonwealth of Pennsylvania State System of Higher Education; Bloomsburg University of Pennsylvania of the State System of Higher Education; James McCormick, Chancellor of the State System of Higher Education; Jessica Kozloff, President of Bloomsburg University, and James Percey, Professor.

On March 31, 1998, Defendants Commonwealth of Pennyslvania, State System of Higher Education, Bloomsburg University, Jessica Kozloff and James McCormick filed a motion for summary judgrnent. Also on March 31, 1998, Defendant Percey filed a motion for summary judgrnent. Plaintiff did not file a brief in opposition to Defendant Percey's motion for summary judgment. Furthermore, in Plaintiff's brief in opposition to the motion for summary judgment filed by the other defendants, Plaintiff agreed voluntar-

ily to withdraw all claims against Percey, McCormick and Kozloff. Plaintiff also stated that the only claims that remain before the court are those asserted against the State System of Higher Education and Bloomsburg University for age and national origin discrimination. On June 26, 1998, we granted Percey's motion for summary judgment and on July 14, 1998, we issued an order granting the motion for summary judgment filed by the remaining defendants. That order fully explained the basis for granting summary judgment in favor of the remaining defendants. On July 27, 1998, Plaintiff filed pro se a motion for reconsideration of our order of July 14, 1998. Plaintiff did not file a brief in support of that motion in accordance with M.D. Pa. Local Rule 7·5[1] Furthermore, the motion has no merit. Consequently, the motion will be denied. Also pending before the court is a petition filed by Hyman Lovitz, Sidney L. Gold, Kevin I. Lovitz and Lovitz and Gold, P.C., to withdraw as counsel for Plaintiff. The motion states that Plaintiff directed counsel on July 23, 1998, to take no further action with respect to the above-captioned matter. Subsequently, on July 27, 1998, Plaintiff filed the pro se motion for reconsideration. By his actions, Plaintiff has indicated that Lovitz and Gold, P.C., no longer represent him. The petition to withdraw appearance will be granted.

NOW. THEREFORE, IT IS HEREBY ORDERED THAT:

1. Plaintiff's motion for reconsideration (Doc. 47) filed on July 27, 1998, is denied.

2. The Petition to Withdraw Appearance (Doc. 50) filed by Hyman Lovitz, Sidney L. Gold, Kevin I. Lovitz and Lovitz and Gold, P.C., is granted.

MM: gs

MUIR
United States District Judge

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1. On August 11, 1998, Lal filed a document in which he stated he would file a brief in accordance with Local Rules 7.22 and 7.30. Because this case was disposed of by pretrial motions Local Rule 7.5 is applicable and not Local Rules 7.22 and 7.30 relating to post-trial motions.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Amrit Lal Ph.D.,
Plaintiff
vs.

COMMONWEALTH OF PENNSYLVANIA : No. 4:CV-97-0982
STATE SYSTEM OF HIGHER, : (Companit Filed 9/3/96)
EDUCATION, ET AL., : (Judge Muir)
Defendants

ORDER
June 26, 1997

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

This age and national origin discrimination case was originally filed on September 3, 1996, in the United States District Court for the Eastern District of Pennsylvania. The case was transferred to this district on May 16, 1997, and received and filed in this district on June 27, 1997. On September 10, 1997, Plaintiff Amrit Lal filed an amended Complaint. The defendants named in the amended complaint are Commonwealth of Pennsylvania State System of Higher Education; Bloomsburg University of Pennsylvania of the State System of Higher Education; James McCormick, Chancellor of the State System of Higher Education; Jessica Kozloff, President of Bloomsburg University, and James Percey, Professor.

On March 31, 1998, Defendants Commonwealth of Pennsylvania, State System of Higher Education, Bloomsburg University, Jessica Kozloff and James McCormick filed a motion for summary judgment. Also on March 31, 1998, Defendant Percey filed a motion for summary judgment. Plaintiff did not file a brief in opposition to Defendant Percey's motion for summary judgment. Furthermore, in Plaintiff's

ment filed by the other defendants, Plaintiff agreed voluntarily to withdraw all claims against Percey, McCormick and Kozloff. Plaintiff also stated that the only claims that remain before the court are those asserted against the State System of Higher Education and Bloomsburg University for age and national origin discrimination. We will, therefore, grant summary judgment in favor of Defendants Percey, McCormick and Kozloff. The issue of whether summary judgment should be granted in favor of the State System of Higher Education and Bloomsburg University will be addressed in a separate order.

NOW. THEREFORE, IT IS HEREBY ORDERED THAT :

1. Defendant Percey's motion for summary judgment (Doc. 19) is granted.

2. All claims against Defendants Percey, McCormick and Kosloff set forth in the amended complaint are dismissed.

_____

Muir
United States District Judge

APPENDIX C

United States Constitution

Amendment V

No person shall be held to answer for a capital. or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use without just compensation.

Amendment VII

In Suits at common law, where the value is in controversy shall exceed 20 dollors. the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

Amendment XIV

Section, 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of rue State wherein they reside No State shall make or enforce any 1aw which shall abridge the privileges or immunities of' citizens of the United States; nor shall any State deprive any person of' life, liberty, or property, without due process of law; nor deny to any person within jurisdiction the equal protection of the laws.

Section 2, Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Repressentative in Congress, the Executive and Judicial officers of a State. or the members of the Legislature thereof, is denied to

any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of mate citizens twenty-one years of age in such State.

Title VII

Sec. 2000e. Definitions

For the purposes of this subchapter -

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, or receivers

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (I) the United States, a corporation wholly owned by the Government of the Untied States, an indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of tilled 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of title 26. except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

x x x x x x

Title VII

Sec. 2000e 2. Unlawful employment practices.

(a) Employer practices

It shall be an unlawful employment practice for an employer

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individuals race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for' employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

x x x x x x

(1) Prohibition of discriminatory use of test scores
It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or natonal origin.

(m) Impermissible consideration of race. color, religion, sex, or national ongin in employment practice.s
Exoept as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex. or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice might adversely affect the interests and legal rights of such person and that an opportunit was available to present objections to such judgment or order by a future date certain, and

(II) a reasonable opportunity to present objections to such judgment or order, or

(ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there baa been an unervening change in law or fact.

x x x x x x

§ 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer-
(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

(b) Employment agency practices
It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

(c) Labor organization practices It shall be unlawful for a labor organization-
(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his

status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation.
It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participant.

(e) Printing or publication of notice or advertisement indicating preference, limitation, etc.

It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

(f) Lawful practices; age an occupational qualification: other reasonable factors; laws of foreign workplace: seniority system; employee benefit plans; discharge or discipline for good cause. It shall not be unlawful for an employer, employment agency, or labor organization.

(I) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension. or insurance plan, which is not a subterfuge to evade the purposes of this chapter except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

(3) to discharge or otherwise discipline an individual for good cause.

(g) Entitlement to coverage under group health plan

(1) For purposes of this section, any employer must provide that an employee aged 65 through 69, and any employee's spouse aged 65 throu 69, shall be entitled to coverage under any group health plan offered to such employees under the same conditions as any employee, and the spouse of such employee, under age 65.

(2) For purposes of paragraph (I), the term "group health plan" has the meaning given to such term in section 162(i)(2) of Title 26.

(g) Practice of foreign corporations controlled by

American employers; foreign persons not controlled by American employers; factors determining control.

(1) If an employer controls a corporation whose place of incorporation in a foreign country, any practice by such corporation prohibited under the section shall be presumed to be such practice by such employer.

(2) The prohibitions of this section shall not apply where the employee a foreign person not controlled by an American employer.

(3) For the purpose of this subsection the determination of whether an employer controls a corporation shall be based upon the

(A) interrelation of operations
(B) common management,
(C) centralized control of labor relations, and
(D) common ownership or financial control, of the employer and the corporation.